

MINUTES OF MEETING OF THE CORPORATIONS COMMITTEE

March 7, 2003

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Sacramento Offices of the California Secretary of State on March 7, 2003. Attendance was as follows:

MEMEBERS PRESENT:

Curt C. Barwick
Keith Paul Bishop
Nelson D. Crandall
Bruce Dravis
James K. Dyer, Jr.
Teri Shugart Erickson
Timothy J. Fitzpatrick
James F. Fotenos
Steven K. Hazen
Mark T. Hiraide
John H. Marlow
Brian D. McAllister
David M. Pike
Cynthia Ribas
Daniel J. Weiser
Brian Wong

MEMBERS ABSENT:

John C. Carpenter
Victor Hsu
Keith B. Martin
Stewart Laughlin McDowell
Ethna M. S. Piazza
Randall Brent Schai
James R. Walther
Neil J Wertlieb
Nancy Wojtas

LIAISONS AND GUESTS PRESENT:

Nick Avdis, Department of Corporations
Betsy Bogart, Secretary of State
John Drews, Senate Banking, Commerce and International Trade Committee
Theresa Finger, Department of Corporations
Timothy Le Bas, Department of Corporations
Terry Miller, State Bar of California
Cathy Mitchell, Secretary of State
Colleen Monahan, Department of Corporations
Gloria Ochoa, Senate Judiciary Committee
Gayle Oshima, Department of Corporations
Michael Yang, Senate Judiciary Committee

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda, which are not described in these minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was called to order by Co-Chair Bruce Dravis at approximately 9:30 a.m. Mr. Dravis requested the persons in attendance to briefly introduce themselves.

B. Minutes of February 7, 2003 Meeting. Mr. Dyer reported that a few minor clerical comments to the draft minutes of the meeting of the Committee held on February 7, 2003 were received from Steve Hazen prior to the meeting. The minutes of the February 7, 2003 meeting previously circulated to the members, with minor revisions to address the comments received by Mr. Dyer prior to the meeting, were approved by the Committee.

II. LIAISONS' REPORTS AND DISCUSSION.

A. Department of Corporations. Theresa Aguilar Finger, Special Projects Manager, California Department of Corporations ("Department"), presented a detailed overview of the Department's Cal-EASI Pilot Project. Noting that the project began in 1996, Ms. Finger reported that several project goals have been accomplished, including the imaging and storing of certain securities and franchise filings for public retrieval over the Internet. Ms. Finger also discussed the future goals of the project. The Department has scheduled the implementation of electronically filing 25102(f) notices through the statewide portal by June 16, 2003. Colleen Monahan discussed the Department's current position with respect to signature requirements associated with such filings and indicated that the Department will be revising its regulations to permit electronic authorization of submissions. A detailed discussion followed, including the confidentiality of certain submissions and the procedure for requesting confidential treatment. Ms. Finger reported that the Department envisions electronic filings through the California statewide portal and provided examples of potential web pages. The pilot project was originally a two-year project, but may be extended to four years. The total costs of the project to date are approximately \$3,500,000 and continuing costs are estimated to be \$465,000. Ms. Finger encouraged the Committee to provide feedback and any suggestions concerning Cal-EASI that its members may have for improving the system or performing desired functions.

B. Secretary of State. Cathy Mitchell, Division Chief, California Secretary of State ("Secretary of State"), provided an update of current events at the Secretary of State. Ms. Mitchell reported that the Secretary and Undersecretary were in the San Francisco office and would not be able to attend the meeting. Ms. Mitchell then provided an overview of the Secretary of State's Business Programs Automation Project. The project, which will involve electronic filings and imaging of documentation, has received funding and the State has contracted with vendors to implement it. The new system will also be used for the internal operations of the Secretary of State. The first phase of the project, the UCC division, is expected to be available for external use by the end of this year. It is estimated that the UCC division will have approximately 5,000,000 images on

line at implementation. The business entities portion of the project will be underway in the near future. Ms. Mitchell reported that she will attend the April or May meeting of the Committee to provide another update on the Business Programs Automation Project.

Next, Betsy Bogart, Supervising Staff Counsel, provided an overview of the Secretary of State's recent experience with AB 55 filings. The Secretary of State is required to have these filings online by the end of 2004 in a searchable form. The Secretary of State has funding for staffing and technology to implement AB 55. The staff of the Secretary of State is reviewing AB 55 filings. Although it has rejected some filings, in general most submissions have been accepted. Ms. Bogart reported that pre-clearance is not available for AB 55 filings. One of the most common mistakes is that many private companies are checking the publicly traded box. Ms. Bogart estimates that the most common reasons for rejection are: (i) the duplication of persons listed as both officers and directors and (ii) the omission of a response to the fraud and bankruptcy line item. Some corporations are attaching their entire 10K or 10Q to the filing, which the Secretary of State will reject because the specific response is not readily apparent. Another problem with some filings is that the persons listed as auditors are not matching with the persons rendering the attached audit report. Ms. Bogart emphasized that only the independent audit report should be attached to the filing. Members of the Committee expressed concern that certified public accountants may not permit the report to be filed without the related financial statements and discussed potential issues arising from the filing of the audit report only. The Secretary of State is sending letters with rejected filings that detail the reason for the rejection and expects to post helpful hints on its website to assist filers. The Secretary of State is preparing AB 55 cleanup legislation and welcomes input and suggestions.

C. Legislative. Terry Miller, Principal Legislative Consultant, the State Bar of California, introduced Gloria Ochoa, Principal Counsel, Senate Judiciary Committee. Ms. Ochoa provided a brief overview of certain pending legislation, including the following:

- SB 220 (Romero): This is the Committee's bill relating to fax filings with the Secretary of State and the Department of Corporations.
- SB 640 (Burton): This bill would prohibit state agencies from contracting with publicly held expatriate corporations and their subsidiaries.
- SB 777 (Escutia): This bill provides additional protection for whistleblowers. The bill is similar to legislation that was adopted by the Legislature last year, but was vetoed by the Governor, with the exception that the criminal penalties previously contained in the prior legislation have been removed. The bill was introduced on February 21, 2003, and has been assigned to the Senate Judiciary Committee.

Next, Mr. Miller introduced Michael Yang, Counsel, Senate Judiciary Committee. Mr. Yang provided an overview of the following pending legislation:

- SB 335 (Romero): This is the corporate three strikes bill that would (i) require business entities that are convicted of certain felonies to satisfy certain reporting requirements and (ii) prohibit repeat offenders from forming business entities and transacting business in California.
- SB 434 (Escutia): This corporate responsibility bill would expand the investigative powers of the Attorney General and the sharing of information between the Attorney General and state agencies.
- SB 766 (Florez): This bill would expand liability for securities violations to non-market participants.
- SB 917 (Alarcon): This bill would expand the scope of fiduciary duties to prohibit a director from taking actions “at the expense of the environment, human rights, the public health and safety, the communities in which the corporation operates, or the dignity of the employees of the corporation.” This bill would be enforced by the Attorney General after January 1, 2017.

Following the presentations of Ms. Ochoa and Mr. Yang, an extensive discussion followed regarding the pending bills. Members of the Committee pointed out that some of the provisions contemplated by these bills may already exist in current California law. The Committee discussed the possibility of testifying at public hearings in such cases.

D. Partnerships and LLC Committee and FASB Reporter. Steve Hazen provided a brief update on recent events concerning the Partnerships and LLC Committee. Mr. Hazen noted that the Partnerships and LLC Committee’s primary areas of focus include (i) the Re-Revised Uniform Limited Partnership Act, (ii) the consequences of the death of a single member of a California limited liability company, and (iii) nonprofit status of California limited liability companies.

E. Corporate Law Department Committee. Curt Barwick provided a brief summary of the recent activities of the Corporate Law Department Committee, noting that the committee has been involved with several MCLE programs. At its last meeting, the Corporate Law Department Committee had an extensive discussion regarding in-house legal opinions covering (i) opinions given by in-house counsel that are not customarily given by outside counsel, (ii) liability issues, and (iii) directors and officers insurance coverage.

F. UCC Committee. Jim Fotenos reported on the recent activities of the UCC Committee, including its discussion of the status of online UCC filings.

III. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS

A. 25118(b) Definition of Aggregate Evidences of Indebtedness. Dan Weiser reported that the Committee's legislative proposal has been forwarded to the UCC Committee for review and comment.

IV. OTHER PROJECTS

A. Opinion Project. Nelson Crandall reported on the recent activities of the Legal Opinions Committee. A discussion of the scope of the Committee's project in light of the activities of the Legal Opinions Committee followed.

B. Guide to Organizing a California Corporation. Teri Erickson distributed a handout with an example of the proposed form of the revised *Guide to Organizing a California Corporation*. Ms. Erickson also briefly described her objectives for the revised *Guide*.

C. Blue Sky Guide. Keith Bishop reported that the *Blue Sky Guide* has been completed and the State Bar is considering options for publication of the *Guide*.

D. Comment Letter on Revised SEC Proposal Regarding Attorney Conduct. Co-Chair Bishop provided a brief overview of the status of the pending proposed rules of the Securities and Exchange Commission under Section 307 of the Sarbanes-Oxley Act of 2002. The SEC has extended the comment period with respect to the noisy withdrawal provisions of the proposed rules and has proposed an alternative approach. Jim Fotenos presented a summary of the draft response letter that was included in the Committee materials distributed prior to the meeting. An extensive discussion followed. The Committee authorized the drafting committee to proceed with a comment letter consistent with the approach set forth in the draft reviewed by the Committee.

E. Committee Matrix. Jim Dyer reminded the Committee that certain background information regarding each member is required by the State Bar of California. Mr. Dyer will follow up with those who have not responded to his previous request for such information.

V. NEW BUSINESS

A. AB 664 and 665. Co-Chair Dravis briefly discussed AB 664 and AB 665, copies of which were included in the Committee materials distributed to the members of the Committee prior to the meeting.

The meeting was adjourned at approximately 12:30 p.m.

James K. Dyer, Jr.